

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)	
)	
MRS. FIELDS FRANCHISING)	
a Delaware limited)	
liability company,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	2:14-CV-00776BSJ
BEKTROM FOODS a North)	
Dakota corporation,)	
)	
Defendant.)	
)	
_____)	

BEFORE THE HONORABLE BRUCE S. JENKINS

April 15, 2015

Motion for Judgment on the Pleadings

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1 **Salt Lake City, Utah April 15, 2015**

2 *** * * * ***

3 THE COURT: Then let's turn to Mrs. Fields Franchising
4 versus Bektrom Foods, here today on a motion for judgment on
5 the pleadings and also for scheduling.

6 Those who are making appearances, if you will be kind
7 enough to make a record for us, tell us who you are and whom
8 you represent.

9 MR. ANDREASON: Your Honor, Rod Andreason, Kirton and
10 McConkie, on behalf of the plaintiff, Mrs. Fields
11 Franchising, LLC.

12 THE COURT: Okay.

13 MR. BENNION: Good afternoon, Your Honor. David
14 Bennion on behalf of the defendant Bektrom Foods.

15 MR. WINZELER: And Zack Winzeler also on behalf of
16 Bektrom Foods.

17 THE COURT: Okay. You go ahead.

18 MR. ANDREASON: Would you like me to go ahead with the
19 motion, Your Honor?

20 THE COURT: I'm sorry?

21 MR. ANDREASON: Did you want me to go ahead on the
22 motion?

23 THE COURT: Yes.

24 MR. ANDREASON: Thank you. Your Honor, it is often
25 easier for me to talk first about what is undisputed before

1 getting to what is disputed, so I'll just go over a couple
2 of quick points that way. The parties don't dispute that
3 the license agreement is a valid contract, that it required
4 Bektrom to make certain guaranteed payments. That Bektrom
5 didn't make those payments. And --

6 THE COURT: Well, how much were they?

7 MR. ANDREASON: The total payments, Your Honor?

8 THE COURT: Sure.

9 MR. ANDREASON: The payments that are outstanding are
10 about \$750,000.00.

11 THE COURT: And how much on a periodic basis?

12 MR. ANDREASON: I believe it was \$100,000.00 was the
13 amount of each -- in each period, Your Honor.

14 THE COURT: Okay. And we're talking about how many
15 periods?

16 MR. ANDREASON: I believe it was -- now you're going
17 to test me, Your Honor, I could look that up, it was several
18 periods, I believe it was five, but I could look that up if
19 would you like.

20 Although it gets us a little past the point in the
21 sense, Your Honor, that that is not really disputed, the
22 parties don't have an issue with that or that Bektrom failed
23 to make the payments themselves, or that the agreement makes
24 the guaranteed payments all of them that are due, due in
25 full on termination. What is disputed though here is

1 whether or not we can have a judgment on the pleadings when
2 there is a defense of waiver in a claim for the breach of
3 the covenant of good faith and fair dealing.

4 THE COURT: Well, how much are you asking for?

5 MR. ANDREASON: \$750,000.00 Your Honor, roughly.

6 THE COURT: You say that is undisputed.

7 MR. ANDREASON: That I have seen no dispute on that
8 amount, yes, Your Honor, that is correct.

9 THE COURT: Okay.

10 MR. ANDREASON: So the issue in our view, Your Honor,
11 is whether the defense of waiver in the claim for breach of
12 the covenant of good faith and fair dealing prevents
13 judgment on the pleadings because waiver under the covenant
14 of good faith involved fact intensive inquiries, or in other
15 words, because waiver of the covenant of good faith are
16 typically factual inquiries are they insulated from the
17 pleading requirements of *Twombly* and *Iqbal*. And we would
18 submit, Your Honor, that the answer to that question is a
19 resounding no. While the fact inquiry may be involved in an
20 analysis of the claim on summary judgment or otherwise,
21 viewing the pleadings, or on a motion to dismiss, as you
22 know the same standard, requires that they be sufficiently
23 pled. Even waiver and the covenant of good faith and fair
24 dealing must comply with *Twombly* and *Iqbal*.

25 As the court is aware, *Twombly* held some pretty new

1 things when it came out. It was a pretty landmark decision
2 by the United States Supreme Court. Among other things the
3 court held that a plaintiff's obligation to provide the
4 grounds of his entitlement to relief requires more than
5 labels and conclusions. The court also held that courts are
6 not bound to accept as true a legal conclusion couched as a
7 factual allegation.

8 After that, *Iqbal* came forth and issued, or outlined
9 rather, a two-pronged approach based on *Twombly* stating that
10 there are two working principles under -- that underlie, the
11 court says, our decision in *Twombly*. First the tenet that a
12 court must accept as true all of the allegations contained
13 in the complaint is inapplicable to the legal conclusions.
14 Second, only a complaint that states a plausible claim for
15 relief survives a motion to dismiss.

16 Now in both *Twombly* and *Iqbal* the court proceeded or
17 rather began its analysis after stating those standards
18 identifying the allegations in the complaint that are not
19 entitled to assumption of truth. So I recommend that we do
20 that also in this case. Does Your Honor have a copy of the
21 answer and counterclaim that was filed in this case? I
22 would like to look at that. In a particular, on Page 5
23 where waiver is discussed, the defense of waiver, this is
24 how it is stated exactly, Your Honor. Mrs. Fields waived
25 any can claimed to minimum guarantees under the license

1 agreement because it agreed after the execution of a license
2 agreement to accept royalty payments based on the actual
3 sales which Bektrom has already paid in lieu of the minimum
4 guarantees. So under prong one, Your Honor, we ask what are
5 the facts as opposed to the conclusions? Frankly, Your
6 Honor, there are no facts except for potentially that the
7 parties agreed to something. But reaching an agreement
8 itself is a conclusion there is nothing stating, for
9 example, who within Mrs. Fields or Bektrom were involved in
10 such an agreement. How it took place. Was it orally? Was
11 it in writing? What kind of writing? What was the actual
12 fact that support this event, this conclusion, that an
13 agreement was reached to waive \$750,000.00 in amounts owed.

14 Importantly, this guarantee for this amount of money
15 was not some ancillary condition to the agreement, it is
16 actually the primary method of payment. In sum, there are
17 no facts in this waiver defense, Your Honor, only those
18 conclusions. Prong two on plausibility. Is this claim,
19 this defense asserted of waiver, plausible? Well, Your
20 Honor, they're stating that Mrs. Fields waived its minimum
21 guarantee, the primary source of funding, in order to get
22 something that was already entitled to, royalty payments.
23 Why would Mrs. Fields waive one of the things that it was
24 entitled to in order to get the other? It is not plausible
25 on its face. Why would Mrs. Fields agree to permanently

1 give up over \$750,000.00 in guaranteed payments? Why would
2 it do so in exchange for zero consideration? Why would it
3 do so contradicting three specific terms of the license
4 agreement that state -- that it is entitled to that money
5 and that there is no waiver by the parties except in writing
6 signed and executed by the parties, or that waiver by one
7 party as to one item doesn't constitute waiver as to any
8 other item. Sections 20.4, 31 and 39 all speak to those,
9 Your Honor, and we can look at those specifically but those
10 are before you in the brief.

11 So under the waiver defense, we would submit, Your
12 Honor, that there are no facts and it is not plausible under
13 *Twombly* and *Iqbal*.

14 Moving to the covenant of good faith and fair dealing,
15 if you look at the counterclaim, Your Honor, and feel free
16 to look at that in front of you, there is only one paragraph
17 that supplies the entire allegations of the counterclaim
18 that we could look to to see if there are one, facts, as
19 opposed to conclusions, and two, plausibility.

20 Here is what it says. Mrs. Field's regularly misused
21 its discretion under Section 21.2 in the following
22 non-exhaustive ways. And the first one is failing to review
23 let alone approve Artwork/Samples for license product
24 submitted by Bektrom, or otherwise failing or refusing
25 entirely to respond to Bektrom's requests for review and

1 approval of Artwork/Samples for licensed products. Let's
2 talk about that first one for a moment.

3 There is nothing in that statement that is a fact. It
4 is a conclusion that Bektrom believes or is asserting that
5 Mrs. Fields failed to do something. What action regarding
6 what submissions, what artwork samples. Your Honor, we
7 don't know how it failed to do that, and that is the factual
8 underpinning that *Twombly* and *Iqbal* requires. Were these
9 actually submitted to Mrs. Fields? When did such submission
10 occur? Did the artwork meet any of the standards in the
11 license agreement for submission in the first place? If
12 Mrs. Fields failed or refused to do something, did Bektrom
13 complain about it? How did it do that? Did it get a
14 response? The very fact that Bektrom uses the words or
15 otherwise to describe this conclusion indicates that it is
16 not sure and it doesn't have the facts for it.

17 The second part of this photograph 10 says that
18 Mrs. Fields misuses its discretion by quote improperly
19 withholding approval for Artwork/Samples for licensed
20 products submitted by Bektrom in an attempt to extract
21 payments from Bektrom.

22 Now, let's look at that allegation. Improperly
23 withholding approval is not a fact, it's a conclusion. We
24 don't know what was proper or not because we don't know what
25 was submitted, what artwork or samples. When was approval

1 sought? What are these payments that Mrs. Fields allegedly
2 attempted to extract? Under *Iqbal* and *Twombly*, Your Honor
3 we have to say something, not just a conclusion.

4 The third sentence that they provide in that same
5 paragraph says that Mrs. Fields was improperly acting by
6 initially granting approval for certain Artwork/Samples for
7 licensed products submitted by Bektrom only to later
8 withdraw approval after Bektrom had expended resources
9 developing and manufacturing the licensing -- licensed
10 products.

11 Now stopping there to look at that particular
12 allegation, withdrawing approval is a conclusion, not a
13 fact. What facts show that Mrs. Fields withdrew anything?
14 When did they do it? What did they withdraw? What was even
15 submitted to them in the first place that they would
16 withdraw approval of. If there are certain artwork or
17 samples, which is what this allegation states, why aren't
18 they identified? There is nothing certain at all here, Your
19 Honor.

20 And then the fourth one I suppose is almost close to a
21 catch-all and that is that Mrs. Fields quote, refused
22 entirely to review or approve Artwork/Samples for spice
23 shakers submitted by Bektrom. Again this is a conclusion.
24 How do we know that Mrs. Fields actually refused anything?
25 We simply don't know. What did it do that constituted

1 refusal? Why is that a refusal as opposed to simply
2 forgetting about it or losing the samples? Why was it an
3 accident as opposed to some intentional act? We have no
4 idea, Your Honor. So under prong one, we don't have facts.

5 Bektrom could be alleging any type of failure to
6 approve any item, it could be a label on the packaging. We
7 don't know what the failure to approve was. Mrs. Fields did
8 business with Bektrom for two years, but Bektrom gives us no
9 actual facts about why it did something wrong. Even
10 regarding Mrs. Fields' use of discretion, which it is
11 entitled to under the contract, Bektrom admits that it
12 doesn't know what those facts are, and this is a quote from
13 its opposition memorandum, Your Honor. Only discovery in
14 this case will reveal whether Mrs. Fields had any reason at
15 all for refusing to review and/or disapprove Bektrom's
16 submissions. That, Your Honor, is not a pled fact, that is
17 a fishing expedition and it is insufficient under *Twombly*
18 and *Iqbal*.

19 Ultimately under *Iqbal* claims need not be unrealistic
20 to be rejected as mere conclusions. The court there held,
21 to be clear, we do not reject these bald allegations on the
22 ground that they're unrealistic or nonsensical. It is the
23 conclusory nature of respondent's allegations rather than
24 their extravagantly fanciful nature that this entitles them
25 to the presumption of truth. Because they're conclusions

1 not facts, they can't continue.

2 I recommend, Your Honor, when you speak with Bektrom's
3 counsel, when he appears before you next, that you ask him
4 what are the facts? Please tell us what facts support this
5 counterclaim for breach of the covenant of good faith and
6 fair dealing.

7 Then finally on prong two for plausibility as to that
8 claim, Your Honor, why would Mrs. Fields ignore artwork or
9 samples that would generate royalties for it in the first
10 place? If the allegation is that Mrs. Fields didn't approve
11 samples that Bektrom could have used to sell and generate
12 royalties which they would have paid to Mrs. Fields, why
13 would Mrs. Fields even do that? Why would Mrs. Fields avoid
14 getting the money that it could if it provided this
15 allegedly withheld approval.

16 Secondly, why did Bektrom complain about this only
17 after the license agreement was terminated? We have no
18 record of any complaint that Mrs. Fields failed to do
19 anything including review Artwork/Samples until after they
20 were told that the agreement was done and that they owed the
21 guaranteed royalties.

22 Now, in opposition Bektrom expounds on a lot of
23 ancillary issues. They have an elegant opposition
24 memorandum, Your Honor, but it doesn't address the actual
25 issues in the case which is whether or not that counterclaim

1 meets *Iqbal* and *Twombly* by pleading facts. The only thing
2 that truly responds from Bektrom's perspective is the
3 general statement that deciding waiver defense and the
4 covenant of good faith and fair dealing involves questions
5 of fact and therefore should not be decided at this stage.

6 Well, Your Honor, if we were here on summary judgment
7 that might be correct, but we're not. We're here on a
8 motion for judgment on pleadings to decide whether or not
9 Bektrom has sufficiently pleaded its answer defense and its
10 good faith counterclaim.

11 In addition, the court in *Iqbal* held our decision in
12 *Twombly* expounded the pleading standard for all civil
13 actions. So in that essence, Your Honor, I would like to be
14 answering my own initial question. Yes, even waiver and the
15 covenant of good faith and fair dealing are subject to
16 *Twombly* and *Iqbal*. All actions where claims or defenses are
17 pled must have facts, not just conclusions. The policy is
18 clear if the motion for judgment on pleadings is not granted
19 in this regard, what we're going to do, Your Honor, is we're
20 going to have a lot of discovery, get a lot of people
21 involved and pay a lot of money for a claim that has nothing
22 to underlie it other than conclusions. As the court held in
23 *Twombly*, that if it dismisses such claims, quote, left a
24 party with a largely groundless claim be allowed to take up
25 the time of a number of other people with the right to do so

1 representing an in terrorem increment of the settlement
2 value which I interpret as the case moves on through
3 discovery just to try and get some kind of settlement, Your
4 Honor, without anything to really support the claim that is
5 involved.

6 In conclusion, Your Honor, alleging a normally factual
7 counterclaim or defense, like the covenant of good faith and
8 fair dealing and waiver are, do not evade the requirements
9 of *Twombly* and *Iqbal*. After *Twombly*, parties are simply not
10 allowed a free ticket to expensive discovery by pleading
11 conclusions, not facts. Thank you, Your Honor.

12 THE COURT: Counselor?

13 MR. BENNION: Thank you, Your Honor. Your Honor, this
14 motion --

15 THE COURT: Absent the counterclaim, and absent the
16 claim on good faith and fair dealing, if they weren't here
17 at all do you owe them \$750,000.00?

18 MR. BENNION: Did you ask if we do? The answer is no.

19 THE COURT: And tell me why?

20 MR. BENNION: Because --

21 THE COURT: Skip the counterclaim, skip the offsets.
22 Under the contract do you owe them a minimum amount
23 periodically paid?

24 MR. BENNION: The contract calls for a minimum
25 guarantee royalty payment that is periodically paid once a

1 year. It starts at 100,000 and then escalates up to 250,000
2 by the fifth year.

3 THE COURT: They say you owe them 750?

4 MR. BENNION: We don't.

5 THE COURT: And is the reason that you owe them your
6 counterclaim?

7 MR. BENNION: Is the reason that we -- the reason that
8 we don't owe them? The reason we don't owe them is the
9 counterclaim but also the defenses and the denials in our
10 answer. There is more defenses than just waiver and the
11 implied covenant.

12 THE COURT: Well, I understand that. If you just look
13 at the contract, the terms of the contract, skip the other
14 stuff for a moment, you may have an appropriate
15 counterclaim, you may have an appropriate offset.

16 MR. BENNION: I'm with you.

17 THE COURT: Looking at just the words of the contract,
18 did you pay them \$750,000.00?

19 MR. BENNION: We did not.

20 THE COURT: Okay. Under the terms of the contract,
21 did you owe them \$750,000.00 -- -

22 MR. BENNION: If you exclude --

23 THE COURT: -- everything else.

24 MR. BENNION: -- everything else, then yes, the
25 contract provided for those payments.

1 THE COURT: You folks acknowledge that there was a
2 minimum payment to be paid periodically. The minimum wasn't
3 paid. If you added up the minimum payments, there is
4 \$750,000.00?

5 MR. BENNION: I haven't checked the exact math but I
6 assume --

7 THE COURT: I haven't either and he didn't have the
8 exact amount but --

9 MR. BENNION: But, yes. The contract provides for
10 minimum payments over the five years. We made the first
11 minimum payment in year one, and then we paid some
12 royalties.

13 THE COURT: After that.

14 MR. BENNION: But thereafter, there were no minimum
15 payments made. And so that is correct, Your Honor.

16 THE COURT: Okay.

17 MR. BENNION: But that is not obviously the answer to
18 this case.

19 THE COURT: Okay. Now, well I understand that, but it
20 may be the answer to half of it.

21 MR. BENNION: Not really, but we can get into that.

22 THE COURT: Is there any question that 750 is the
23 minimum?

24 MR. BENNION: Again, I haven't put pencil to paper to
25 add the exact dollars of how much was paid.

1 THE COURT: Well, let's ask counsel, what are your
2 dollars?

3 MR. ANDREASON: I'll grab that, Your Honor.

4 MR. BENNION: The --

5 MR. ANDREASON: \$754,488.00.
6 Seven-five-four-four-eight-eight.

7 THE COURT: Now, that just includes the minimum, no
8 interest, no nothing.

9 MR. ANDREASON: That is correct, Your Honor.

10 MR. BENNION: And my understanding is that is the
11 minimum if you add the four years of the minimum payments
12 together and then subtract the royalty payments. Because
13 the royalty payments are an offset to the minimum.

14 THE COURT: Yeah, is that correct.

15 MR. ANDREASON: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. ANDREASON: It is the guaranteed minimum.

18 THE COURT: How much did the --

19 MR. ANDREASON: Pardon me?

20 THE COURT: Do you know what the royalty payments
21 were.

22 MR. ANDREASON: I do not, Your Honor.

23 MR. BENNION: It is -- it is in the complaint. It is
24 like \$65,000.00. It is --

25 THE COURT: Okay. Well, tell me now why you shouldn't

1 pay it?

2 MR. BENNION: Okay, thank you. Here is the problem,
3 judge. The contract that required the payments, it is based
4 on a concept which is Mrs. Field's is going to allow Bektrom
5 to use the Mrs. Fields marks on its products. And the whole
6 idea is that is going to make your products marketable
7 because we have a name that is recognized out there in the
8 public.

9 And the contract provides that Bektrom cannot actually
10 market any of the products with Mrs. Fields' names on them
11 unless they are approved, the artwork on the boxes or
12 whatever is approved and the samples of what is in the boxes
13 is approved by Mrs. Fields.

14 THE COURT: Okay.

15 MR. BENNION: And so inherently that means that
16 Mrs. Fields is going to review the artwork because if they
17 don't, they're impeding Bektrom's ability to even sell any
18 products.

19 THE COURT: Yeah. Well, apparently they sold enough
20 to pay a royalty of 65.

21 MR. BENNION: Just barely -- barely at the beginning
22 they sold a little bit, but there is -- but the concept of
23 the contract was not just for like cake mixes or those kinds
24 of things, there is these spice shakers. One of the
25 allegations, and counsel just read it, was that they never

1 approved they didn't even review a single --

2 THE COURT: Yeah.

3 MR. BENNION: -- submission.

4 THE COURT: Tell me what you submitted?

5 MR. BENNION: Pardon me?

6 THE COURT: Tell me what you submitted?

7 MR. BENNION: My understanding of what was submitted
8 was drawings or mockups of the product boxes with artwork.

9 THE COURT: Do we know when and where?

10 MR. BENNION: I don't have the details of that at this
11 stage in the case, no.

12 THE COURT: Okay.

13 MR. BENNION: But what the client has told me is we
14 submitted artwork and they wouldn't even respond. They
15 didn't say no, they just didn't even answer.

16 THE COURT: Well, yeah. You get into problems in
17 reference to identifying what it is that was submitted and
18 when.

19 MR. BENNION: Well, if that, Your Honor -- our
20 obligation, my understanding under the rules, is we're to
21 supply a short plain statement of the facts. This isn't a
22 fraud case where we are going to plead in particularity so
23 and so submitted this artwork on this day and here is a copy
24 of it.

25 THE COURT: Well, not putting you in a position to say

1 I submitted some artwork. If somebody in fact submitted a
2 product or even a progenitor of a product.

3 MR. BENNION: Right.

4 THE COURT: They did it at some point in time and they
5 gave it to somebody and they asked for a response of some
6 kind.

7 MR. BENNION: Yes.

8 THE COURT: And it is that kind of reasonably factual
9 footing that ordinarily you would layout so that people
10 could understand well did I or did I not get baking soda on
11 such and such a date or a cookie recipe on such and such a
12 date.

13 MR. BENNION: Your Honor, if you're inclined to
14 require that in the pleading stage, then I would request
15 that we have leave to amend our answer and counterclaim and
16 add those kinds of details in. My take of the rules
17 wouldn't require that, but if Your Honor wants it then we
18 will do it that way.

19 THE COURT: Well, I think that way we can deal with
20 specifics. If you have got no real contest as to the
21 minimum, you know, we could make a provisional order and
22 stay the execution in reference to what the contract says,
23 that doesn't deal with your defenses at all, or doesn't deal
24 with your counterclaims at all. But what it does is say
25 under the contract 754, but you may not have earned it. If

1 754 isn't in contest as far as the contract goes, well, you
2 say I have an excuse, we don't owe that, we don't owe that
3 because we submitted product, they didn't respond, I can
4 understand that. But what that does is narrow down the area
5 that we can deal with.

6 MR. BENNION: Your Honor, I think that rather than a
7 provisional order at this stage I would just simply ask for
8 time to re-answer and re-file the counterclaim. Because if
9 you read the -- if you read the counterclaim that we filed,
10 Your Honor, and specifically Paragraph 10 that counsel just
11 read through, and then imagine this, they had admitted these
12 facts. It says, over the course of the parties dealings,
13 Mrs. Fields regularly misused discretion under Section 21.2
14 in the following non-exhaustive ways. One, failing to
15 review let alone approve Artwork/Samples. What if they had
16 just simply admitted that they did that?

17 THE COURT: That would be helpful.

18 MR. BENNION: I agree. But at this stage on a motion
19 under 12(c) the court needs to assume that they admitted
20 that. The court takes that allegation as true.

21 THE COURT: Yeah. I am just trying to truncate things
22 so that we can focus on what is important if you have got a
23 genuine offset or a genuine counterclaim, but let you chip
24 away or extinguish what the contract says.

25 MR. BENNION: Here is another inference that we're

1 entitled to, Your Honor, under Rule 12(c). And as you know,
2 we're entitled to these facts as pled in both our answer and
3 our counterclaim to be taken as true. And one of the -- one
4 of the allegations that counsel was just talking about is
5 that a payment wasn't made after the first year. And so
6 that is September 30th of 2013 the second payment was due.

7 They went through the whole year, more than a year,
8 before they filed their complaint. That connotes, or that
9 implies, that they didn't think they had that payment
10 coming. If they thought that a payment was due on September
11 30, 2013, and no payment was forthcoming, why would they
12 wait for over a year to bring this lawsuit? And that is an
13 inference --

14 THE COURT: They're just lazy.

15 MR. BENNION: Well, maybe they're lazy, but a better
16 inference is that they waived the right to make that claim.
17 And we're entitled to the inferences to go our way at this
18 stage.

19 THE COURT: Well, is that your theory of waiver, that
20 they waited too long?

21 MR. BENNION: No, we pled specifically that the
22 parties agreed and we can put on our witness who will say we
23 had an agreement. They specifically agreed that in lieu of
24 the guaranteed payments the only payments that needed to be
25 made were on actual royalties on actual sales.

1 THE COURT: Was there a conversation with somebody?

2 MR. BENNION: Yes.

3 THE COURT: And do you know who they are?

4 MR. BENNION: Standing here today I don't know. I
5 believe that the man on my side was named Ernie Barbella.

6 THE COURT: And he claims that he had a conversation
7 with somebody?

8 MR. BENNION: Yes.

9 THE COURT: Uh-huh (affirmative).

10 MR. BENNION: And counsel asked why would -- why would
11 Mrs. Fields do that? Well, there is a myriad of reasons why
12 they would do it. For example, if they think hey, if we
13 don't do this, this company is never going to make us one
14 dime and we would rather get something than nothing. So
15 there is all kinds of reasons.

16 THE COURT: Yeah. Well --

17 MR. BENNION: But then the motivation of Mrs. Fields
18 to deny the artwork approvals or to even just fail to review
19 it at all, those motivations are irrelevant to the case,
20 Your Honor. It is not an element of our burden to prove
21 breach of the implied covenant.

22 THE COURT: Well, can you define for me, just talking
23 back and forth here, how the implied covenant was violated?

24 MR. BENNION: Yes. The implied covenant, when you
25 have a provision that says all artwork has to be approved,

1 there is an implication that it is going to be at least
2 reviewed and then it is going to be approved or disapproved
3 on some reasonable basis. And especially when there is a
4 covenant or a provision in the contract that says you can't
5 sell anything with our mark on it unless we approved first.

6 THE COURT: Sure.

7 MR. BENNION: And so there is an implication that
8 they're going to look at it and approve it or disapprove it
9 on some basis. But when the artwork is submitted and they
10 don't even look at it, and the other the other part of that
11 provision says if we don't respond within 10 days that is
12 the same as us saying no. And so for all we know, we mailed
13 them artwork and they never even opened it.

14 THE COURT: Well --

15 MR. BENNION: And so because we don't hear back from
16 them within 10 days, we can't sell anything. And the whole
17 side of idea of this contract is we're going to sell things
18 and then split the money. And so there is absolutely an
19 implied covenant that they're going to not impede our
20 ability to receive the benefit.

21 THE COURT: Well, they're going to look and you're
22 going to end up with a common product. I can understand
23 that.

24 MR. BENNION: Sure.

25 THE COURT: Okay.

1 MR. BENNION: And so if they don't do that, we cannot
2 sell. If we cannot sell, we have no money to pay a royalty
3 with. And then they just sit back and say yeah but pay us
4 the \$250,000.00 of royalty for this year on the minimum
5 guarantee or pay us the 150. And here is an advantage to
6 them. He asked why would they do that? Here is something.
7 Mrs. Fields has a mark. It is exclusive. And the more
8 exclusive it is, the better it is for them.

9 In other words, if everybody can sell their products
10 with Mrs. Fields' marks on it, then Mrs. Fields' mark
11 becomes worthless and it becomes so diluted that it just
12 means nothing in the marketplace. And so the more they can
13 keep their mark from being used, the better it is for them.
14 And especially when they have a deal like this where it is
15 sort of heads I win, tails you lose, because if I don't
16 approve your artwork you can't sell anything but you still
17 owe me in total something this whole contract if you added
18 all of the minimum payments together it was like
19 \$950,000.00. We paid 165 approximately of that. So they
20 make a million dollars for signing a contract that they're
21 not even going to let us succeed on. That is an illusory
22 contract. That is one of our affirmative defenses as well.

23 THE COURT: Well, obviously, they need to do their
24 part. Okay. Well, let me ask counsel for plaintiff were
25 any products submitted?

1 MR. ANDREASON: Pardon me? Say it again, Your Honor?

2 THE COURT: I say were any products submitted?

3 MR. ANDREASON: Your Honor, we have no information as
4 to any products that were submitted and/or improperly
5 refused. But this is the burden of Bektrom.

6 THE COURT: I understand burdens, but I'm just talking
7 back and forth here.

8 MR. ANDREASON: Yeah, we're not aware of any --

9 THE COURT: You either got some products or you
10 didn't. You either looked at them or you didn't. You
11 either approved them or you didn't.

12 MR. ANDREASON: We did look at and approve quite a
13 bit, Your Honor. They're claiming that we didn't do some
14 and we don't know what they're talking about unfortunately.
15 I would like to take strong issue with two things that
16 counsel just said which were incorrect. One he said that
17 Rule 8 pleadings standards are not as low as Rule 9 fraud
18 pleading standards and therefore we don't need to go beyond
19 simply stating the conclusions that he has provided. But in
20 *Iqbal* in 2009, the Supreme Court addressed that head on,
21 that particular argument, that very argument. This is on
22 Page 686 to 687. In response to counsel's argument it said,
23 quote, it is true that Rule 9(b) requires particularity when
24 pleading fraud or mistake. While allowing malice, intent,
25 knowledge and other conditions of a person's mind to be

1 alleged generally, but generally is a relative term. It
2 does not give a plaintiff license to evade the less rigid
3 although still operative strictures of Rule 8. And then
4 here is the key part, Your Honor. Rule 8 does not empower
5 respondent to plead the bear elements of his cause of
6 action, affix the label general allegation and expect his
7 complaint to survive a motion to dismiss. In other words,
8 Rule 8 is not enough if -- excuse me, an allegation is not
9 enough to meet Rule 8 as interpreted by the court in *Twombly*
10 and *Iqbal*.

11 In fact, I read earlier but this is a second point I
12 have to strongly disagree with. Counsel says that the court
13 needs to assume that these allegations in Paragraph 10 of
14 the counterclaim are true. That is false. The court does
15 not assume is true bear conclusions. We read this before
16 from *Iqbal*. The court said, the tenet that a court must
17 accept as true all of the allegations contained in the
18 complaint is inapplicable to legal conclusions. So the
19 court doesn't have to accept those conclusions.

20 Feel free to look all up and down Paragraph 10 which
21 is the -- feel free to look at the whole counterclaim.
22 There is no place besides Paragraph 10 that actually states
23 what they're claiming we did wrong. And in all Paragraph 10
24 it is all about conclusions. That is all there are. For a
25 motion to dismiss or motion for judgment on the pleadings,

1 which has the same standard, that requires dismissal.

2 Now, this is the last point. Counsel quite tellingly
3 said that the facts that you asked him for what actually
4 happened, what was submitted, who, what, when, where, what
5 facts. The only thing that I heard in all of what counsel
6 said that may be a specific fact is that he thinks that a
7 person who I have never heard of before, Ernie Barbello, it
8 may not even be spelled right, may have had a conversation
9 that may have been what led to this supposed agreement.

10 Your Honor, it is nice to get that here in oral
11 argument, but we don't even have that in the counterclaim.
12 We don't have anything. It is all conclusory allegations.
13 The earlier statement he made I think was more accurate in
14 which he said I don't know these facts, my client may know
15 them.

16 MR. BENNION: Your Honor, may I respond?

17 THE COURT: Oh, sure.

18 MR. BENNION: To characterize Paragraph 10 as legal
19 conclusions is just -- it is error. A legal conclusion is
20 -- would be something such as this was a breach of contract.
21 What this Paragraph 10 supplies specifics of the kinds of
22 things that happened. It says they failed -- that
23 Mrs. Fields failed to review art samples for licensed
24 products submitted by Bektrom. That is not a legal
25 conclusion, that is a factual allegation. If they admitted

1 that factual allegation, which in this context you basically
2 have assumed that they did, then we wouldn't even be talking
3 about a motion to dismiss on the -- a motion for judgment on
4 the pleadings. And so the distinction that counsel just
5 drew between Rule 8 and Rule 9 does not apply. We didn't
6 just throw out legal conclusions and elements of claims. We
7 talk here about specific things that were done. Now, could
8 more details be supplied? Yes. But that doesn't mean we
9 didn't meet the requirement?

10 THE COURT: I frankly am interested in what was
11 submitted, when it was submitted. Your Paragraph 10 may
12 well be sufficient if it had something preceding it in the
13 way of this product, this product, this product and this
14 product were submitted. The response there you didn't look
15 at them, I understand that. But I have got to have, it
16 seems to me, in order to deal with the so-called motion for
17 judgment on the pleadings by way of information, by way of
18 counterclaim, something more than you have got there now.

19 MR. BENNION: Well, then what I would request, Your
20 Honor, is give us two weeks and we'll file an amended answer
21 and counterclaim and then they can renew their motion if
22 they think there is still a motion.

23 THE COURT: Okay. Well, I think that probably makes
24 sense. And what I will do is I will treat the motion for
25 judgment on the pleadings as a motion to dismiss the answer

1 and counterclaim. We'll grant that. We'll give you 20 days
2 to file an amended answer and counterclaim. Flesh it out.

3 I'll at this point in time deny the motion for
4 judgment on the pleadings. Let's see what you come up with.
5 Anticipating that you're going to do that within 20 days, as
6 long as you're both here I'll save you a trip. How soon can
7 plaintiff get his work done assuming that we're going to
8 have to have some information gathering in reference to the
9 answer and counterclaim as amended?

10 MR. ANDREASON: So with 20 days, Your Honor, for them
11 to refile their answer and counterclaim, how much further
12 time do we need to determine whether or not --

13 THE COURT: I didn't quite hear.

14 MR. ANDREASON: So after they file their answer and
15 counterclaim, Your Honor, how much additional time do we
16 need as plaintiff to do what?

17 THE COURT: For discovery purposes.

18 MR. ANDREASON: For discovery purposes, Your Honor?
19 Boy, it is hard to say without knowing what they're going to
20 plead, Your Honor.

21 THE COURT: Okay. Well, let's let them plead and
22 we'll deal with that down the road. I was going to save you
23 a trip but that is all right, it makes no difference to me.

24 MR. ANDREASON: We like being here, Your Honor, and
25 one --

1 THE COURT: That is fine.

2 MR. ANDREASON: One additional thought, Your Honor,
3 you may want to ask counsel for Bektrom to supply you with a
4 redline from its prior counterclaim showing the changes made
5 so that you can identify what the specifics are.

6 THE COURT: I can identify it. I am happy if he just
7 does his work.

8 MR. ANDREASON: Thank you, Your Honor.

9 THE COURT: Thanks a lot.

10 MR. BENNION: We'll do it, Your Honor.

11 THE COURT: Thank you. Why don't you send me a little
12 order treating your motion as a motion to dismiss and the
13 deadlines that we fixed.

14 MR. BENNION: So the motion to dismiss is granted
15 without prejudice.

16 THE COURT: I'm sorry?

17 MR. BENNION: Just so I understand what this --

18 THE COURT: Well, with leave to amend.

19 MR. BENNION: Yeah, but the motion to -- for judgment
20 on the pleadings is denied, but a motion to dismiss under
21 12(b)(6) is granted without prejudice subject to our filing
22 an amended --

23 THE COURT: Well, it is granted with leave to amend.

24 MR. BENNION: Okay.

25 THE COURT: And we'll be in recess until tomorrow.

1 MR. ANDREASON: Thank you, Your Honor.

2 MR. BENNION: Thank you, Your Honor.

3 THE COURT: At 9:30 a.m.

4 (Whereupon, the hearing concluded.)

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I, Laura W. Robinson, Certified Shorthand
Reporter, Registered Professional Reporter and Notary Public
within and for the County of Salt Lake, State of Utah, do
hereby certify:

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

Laura W. Robinson

RPR, FCRR, CSR, CP